Supreme Court, U.S.
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No. 94-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF SOUTH CAROLINA,

Petitioner,

vs

JAMES DONALD FOSSICK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

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QUESTIONS PRESENTED

I.

DID THE STATE COURT HEARING JUDGE ERR IN FINDING THAT THE SOLICITOR'S CLOSING ARGUMENT REFERENCE TO RESPONDENT'S LACK OF REMORSE CONSTITUTED A FIFTH AMENDMENT VIOLATION OF RESPONDENT'S PRIVILEGE AGAINST SELF-INCRIMINATION WHERE THE PRIVILEGE WAS WAIVED WHEN RESPONDENT VOLUNTARILY CONFESSED TO THE MURDER AND WHEN RESPONDENT TESTIFIED IN HIS OWN BEHALF AT TRIAL?

II.

DID THE SOUTH CAROLINA SUPREME COURT ERR IN FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO THE SOLICITOR'S CLOSING ARGUMENT REFERENCE TO RESPONDENT'S LACK OF REMORSE CONSTITUTED A VIOLATION OF RESPONDENT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE REFERENCE DID NOT INFECT THE TRIAL WITH UNFAIRNESS SO AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS AND WARRANTING REVERSAL OF THE CONVICTION?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner, State of South Carolina, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO THE OPINION BELOW

The Order of the Richland County Court of Common Pleas is unreported and is attached to this Petition as Appendix A at pages A-1 - A-46. The Opinion of the Supreme Court of South Carolina affirming in part and reversing in part the Order of

the Court of Common Pleas is reported as James Donald Fossick v. State, ___ S.C. ___, 453 S.E.2d 899 (1995), and is attached to this Petition as Appendix B at pages A-47 - A-49. The Order of the South Carolina Supreme Court denying rehearing is unreported but is attached to this Petition as Appendix C at page A-50.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on January 30, 1995. Rehearing was denied by the South Carolina Supreme Court on February 23, 1995. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth Amendment to the United States Constitution, which provides in pertinent part regarding criminal prosecutions, "the accused shall enjoy the right...to have

the assistance of counsel for his defense."

2. It also involves the Fifth Amendment which provides in pertinent part that an accused "...shall not be compelled in any case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law..."

3. This case additionally involves the Fourteenth Amendment to the United States Constitution which provides in pertinent part, "[N]or shall any state deprive any person of life...without due process of law, nor deny to any person within its jurisdiction the Equal Protection of the laws."

4. It also involves S.C. Code §17-27-20 (1986 Cum. Supp.), the Uniform Post-Conviction Procedure Act, which in pertinent part provides as follows:

> (a) Any person who has been convicted of...a crime and who claims:

> (1) That the conviction... was in violation of the Constitution of the United States...[or]
>
> (6) That the conviction... is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;
>
> may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

STATEMENT OF THE CASE

I. Procedural History

This matter comes before this Court pursuant to a Petition for Writ of Certiorari from the South Carolina Supreme Court's reversal of the state hearing court's denial of Respondent's post-conviction relief application.

Respondent, James Donald Fossick, is presently confined in the Broad River Correctional Institution of the South Carolina Department of Corrections pursu-

ant to orders of commitment of the Clerk of Court for Richland county. Respondent was indicted at the October 1985 term of the Court of General Sessions for the murder of Marilee Whitten. Respondent was represented at trial and on appeal by L. Lester Bates, III, as primary counsel. Mr. Bates was deceased at the time of the post-conviction relief evidentiary hearing. A jury trial was held on January 27-29, 1986, at the conclusion of which Respondent was found guilty of murder. Respondent was sentenced by the Honorable C. Anthony Harris to confinement for life.

The Respondent filed a timely Notice of Intent to Appeal and an appeal was perfected by Lester L. Bates, III, Esquire. After the filing of briefs in this case, oral argument was heard by the Supreme Court of South Carolina on June 11, 1987. On June 22, 1987, the South Carolina Supreme Court affirmed Respon-

dent's conviction and sentence in a Memorandum Opinion filed June 22, 1987 (Memo. Opinion No. 87-MO-300).

Thereafter, Respondent filed an application for post-conviction relief dated March 5, 1992, before the South Carolina Court of Common Pleas. Petitioner made return and supplemental return to the application on June 16, 1992, and February 5, 1993. An evidentiary hearing was held on February 12, 1993. No testimony was presented during the hearing. The parties made stipulations as to matters of fact and submitted trial briefs as to legal issues involved. An Order of Dismissal was issued by the South Carolina Court of Common Pleas on June 6, 1993, which denied and dismissed Respondent's application for post-conviction relief.

Respondent filed and served Notice of Intent to Appeal from denial of post-conviction relief and Petition for Writ of

Certiorari was made to the South Carolina Supreme court on December 9, 1993 and Petitioner made Return on January 25, 1994. Certiorari was granted and briefs were filed by Respondent on June 14, 1994, and by Petitioner on August 15, 1994. In a Memorandum Opinion dated January 30, 1995, the South Carolina Supreme Court reversed the circuit court order denying Respondent's post-conviction relief. On February 1, 1995, Petitioner petitioned the South Carolina Supreme Court for rehearing which petition was denied on February 23, 1995.

II. Factual Background

A. Trial and Direct Appeal

The victim in this case, Marilee Whitten, was last seen by her father on May 11, 1985 at 7:30 AM when he left the home for work. (Tr. p. 86 lines 2-18; p. 87 lines 10-19). Marilee had just begun part-time work as a groomer at an animal

clinic. (Tr. p. 86 lines 6-18). Marilee and her father planned to meet at home at 2:00 p.m. to shop for Mother's Day but Marilee never arrived. (Tr. p. 87 line 22 - p. 88 line 13). Emma Taylor saw the victim as late as "around 1:00 P.M. on May 11, 1985. She was reported missing that day. (Tr. p. 13 lines 11-15; p. 94 lines 5-8).

On May 11, 1985, Shane Parker met the victim, who had just begun work as a groomer in the animal clinic where the two flirted and Whitten gave Parker her telephone number. (Tr. p. 85; p. 98 line 14 - p. 99 line 14; p. 118 lines 4-16; p. 309 lines 14-22). Parker and Respondent worked in another section of the clinic that day but they and Whitten worked until approximately 1:10 PM or 1:15 PM. (Tr. p. 96 lines 14-24; p. 98 lines 14-18; p. 315 lines 17-18). After work, Parker observed the victim talking to Respondent in the

animal clinic parking lot (Tr. p. 100 lines 3-18). He also observed the victim at approximately 1:30 to 1:35 PM parked near the intersection of Quail Hill and Pointer Streets in the Quail Point subdivision. (Tr. p. 101 line 13 - p. 102 line 5). The victim was alone in her car with Respondent at her window talking and Respondent's car parked nearby. (Tr. p. 101 line 13 - p. 103 line 19; p. 105 lines 1-4). Parker called the victim's home twice later that day. Parker denied that he killed the victim with a tire iron or that he asked Respondent to "cover for him" (Tr. p. 105 lines 9-25). Parker never saw the victim again. (Tr. p. 124 lines 2-9; p. 126 lines 9-10). The victim's car was found in the Quail Point Subdivision on May 14, 1985 and her body was located nearby in a wooded area nude except for socks, lying on her back with her legs spread widely apart. (Tr. p. 132

line 20 - p. 134 line 4; p. 138 line 9 - p. 140 line 1; p. 141 lines 11-23). No unfamiliar hairs or fibers were found on the victim; none of the victim's hair or anything of evidentiary value was found in the Respondent's trunk in September, 1985, some four months later; and no blood, hair, or fiber from the crime scene matched Respondent or any other person. (Tr. p. 156 line 5 - p. 157 line 12; p. 165 lines 2-11; p. 166 lines 7-23; p. 166 lines 7-23; p. 172 lines 1-12). No fingerprints other than the victim's were found in the victim's car. (Tr. p. 171 lines 1 - 11; p. 172 lines 1-6). The cause of the victim's death was determined to be a head fracture caused by a large, heavy object. (Tr. p. 175 line 24 - p. 176 line 44). The victim presented injuries to the left arm and knees which were consistent with running and falling. (Tr. p. 176 line 24 - p. 177 line 6). Post-

mortem drag marks were visible on the victim's chest and legs and were consistent with the victim being dragged face down after death. (Tr. p. 177 lines 9-19; p. 178 lines 2-7; p. 183 lines 1-3). The pathologist opined that the victim had been dead approximately one week when her body was found. (Tr. p. 178 lines 13-22).

On May 16, 1985, Respondent reported to law enforcement officers that he last saw the victim with Shane Parker in the animal clinic parking lot and that he proceeded to Woodhill Mall to purchase a Mother's Day gift. (Tr. p. 198 lines 16-17; p. 204 lines 9-18; p. 211 lines 212 line 21). The following day, Respondent admitted leaving with Marilee and going with her to an Amoco station and that she followed his car from there to a "drug house" where he left the victim and Parker. (Tr. p. 205 line 12 - p. 207 line 3). During a second conversation with officers

that day, Respondent admitted he remained with the victim and that Parker left. (Tr. p. 207 line 4 - p. 208 line 17). On May 18, Respondent advised law enforcement officers that he told Marilee where she could get drugs and was guiding her there, last seeing her turn where he directed. (Tr. p. 226 line 19 - p. 227 line 12). Respondent gave a confession to law enforcement officers on September 4 in which Respondent indicated that he wanted to turn himself in for some time. (Tr. p. 238 lines 20-21). Respondent admitted that after Shane Parker left, the victim parked her car where police later found it and rode with Respondent on an unsuccessful trip to purchase drugs. (Tr. p. 238 line 13 - p. 239 line 4). Respondent admitted that he drove back to the victim's car and, after a struggle, pushed the victim into the trunk of his vehicle. (Tr. p. 239 lines 4-14). Respondent drove

to the neighborhood where the victim's body was later found and pulled into a wooded area there and opened the trunk. (Tr. p. 239 lines 14-16). When the victim got out of the trunk, she began to undress "because she knew what ... (he) was going to do." (Tr. p. 239 lines 16-18). Respondent admitted that when he pulled his pants down the victim started to run and he tripped her and that the victim bit and scratched him when he was on top of her. (Tr. p. 239 lines 18-20). Respondent admitted that he struck the victim's head twice with an urn, that he dragged her body, and that he left her lying on her back with her legs spread. (Tr. p. 239 lines 20 - p. 240 line 2). Respondent admitted that he removed gum from the victim's pants and went to Woodhill Mall and the other locations as previously disclosed by Respondent to law enforcement officers. (Tr. p. 240 lines 2-15).

Respondent admitted that the incident took approximately 30 to 45 minutes and displayed to law enforcement officers a scar on his arm caused by the victim's bite. (Tr. p. 240 line 22 - p. 241 line 24). Respondent directed law enforcement officer to the location Respondent previously described and Respondent pointed out the urn. (Tr. p. 241 line 25 - p. 242 line 19; p. 290 lines 5-12). Law enforcement officers reported that Respondent did not appear upset or show any emotion when he confessed or when he saw the urn. (Tr. p. 264 lines 14-20; p. 292 lines 5-6).

A defense witness was retained to prepare a map of the area with mileage figures and admitted that the victim's body was found approximately 300 yards from Respondent's home. (Tr. p. 297 lines 9-20; p. 298 line 6 - p. 299 line 4; p. 306 lines 19-25; p. 307 lines 3-6; p. 307 lines 10-12).

James Hester, testifying for the defense, stated that he passed telephone numbers between Parker and the victim at the animal clinic on the day the victim disappeared and stated that Parker and the victim expressed interest in each other. (Tr. p. 314 line 1 - p. 322 line 5).

Respondent also presented the testimony of an acquaintance who saw Respondent at Woodhill Mall at approximately 2:15 or 2:45 PM the day Marilee disappeared and stated that Respondent later asked him to go to court for him, however, the request was made by Respondent before the victim's body was found. (Tr. p. 324 lines 14-17; p. 326 lines 23 - p. 327 line 5; p. 327 lines 19-23; p. 329 line 2 - p. 331 line 8). A school friend of Respondent's also saw him that day at approximately 2:30 PM on Rosewood Drive. (Tr. p. 335 line 1 - p. 336 line 11). He was with Respondent until approximately 3:05 PM. (Tr. p. 339

line 11 - p. 340 line 17; p. 342 lines 2-15; p. 343 lines 2-8; p. 344 lines 7-13; p. 345 lines 10-13; p. 347 lines 3-12).

According to Respondent's parents, Respondent returned to his home at approximately 3:30 PM to 3:45 PM where he appeared and acted normal. (Tr. p. 349 lines 9-25; p. 363 lines 4-9; p. 363 lines 17-20). Respondent played basketball at approximately 4:15 PM to 6:00 PM and appeared normal. (Tr. p. 351 lines 20-21; p. 365 lines 24-25; p. 373 line 5 - p. 374 line 20; p. 383 lines 11-20; p. 384 lines 15-16).

Respondent testified in his own behalf and presented an alibi defense. Respondent denied killing the victim and asserted that he left the victim at the animal clinic parking lot with Shane Parker and that he went to Woodhill Mall, the Piggly Wiggly, the animal shelter and, lastly, home. (Tr. p. 411 lines 7-11; p.

414 line 25 - p. 415 line 12; p. 421 lines 8-12; p. 423 line 11 - p. 424 line 8; p. 425 line 2 - p. 426 line 2; p. 427 lines 4-5; p. 429 lines 2-5; p. 431 line 2 - p. 432 line 17; p. 434 lines 19-22; p. 435 lines 13-22). Later, Respondent played basketball at approximately 4:00 PM and returned home at 6:00 PM. (Tr. p. 435 lines 18-22; p. 436 lines 6-12; p. 437 lines 2-6). Respondent stated that Parker admitted killing the victim with a tire iron but Respondent did not report this to the police. (Tr. p. 440 lines 1-15; p. 440 line 23 - p. 441 line 4). Respondent also asserted that he gave the confession because of threats of the electric chair or promises from officers of psychiatric help and promises that officers would talk to the solicitor. (Tr. p. 451 lines 1-25). However, Respondent admitted he was familiar with the area where the victim's body was found and knew of its secluded

nature. (Tr. p. 476 lines 1-10). Respondent also displayed to the jury his ability to hold the urn and admitted that he would have no difficulty holding or throwing it. (Tr. p. 469 line 18 - p. 470 line 12). Evidence elicited earlier in the trial indicated that the ceramic vase or urn which was identified by Respondent as the murder weapon weighed eighteen pounds. (Tr. p. 170 lines 5-17).

In his summation to the jury, Respondent's attorney argued that the prosecution issued threats and promises to secure Respondent's confession; that Respondent had provided an incomplete alibi as a defense to the charge; that Respondent should be considered innocent because he was observed by others acting normally just after he was to have committed the offense which indicated he could not be guilty; and that the State's version of the facts was not credible. (Tr. p. 504,

line 1 - p. 521, line 20; p. 527, lines 1-24). Specifically, Respondent's attorney argued

> He went straight to Woodhill Mall, no blood on him, no chance to clean up, ran into people he really doesn't know -- Andy Anderson -- ran into people he really doesn't even know by chance, and thank God for chance meetings, ran into epople (sic) he didn't know, was acting perfectly normal with no blood or scratch marks.
>
> If you are going to convict James Fossick, you have to convince yourself beforehand that he could not murder somebody quickly, leave immediately, not have any blood on him, not be acting strange.
>
> I don't think a Mafia hit man would kill somebody and then go shopping for a Mother's Day present, hang out with his friends like he does every Saturday -- the way James does every Saturday -- and not have any blood, any scratch marks, not be upset, be acting normal. What did he do? He did what he probably does every Saturday. He went around and saw friends, hung out with them and then went off and played some basketball, came home, had supper with his mom and dad and then went to bed.

> The prosecutor wants you to believe that he could do that. "Well she's dead. I didn't get any blood on me. I better rush over to Woodhill Mall and look for a Mother's Day present." That's really what he wants you to believe.
>
> Does that make any sense? The State's story is just incredible. It's just incredible.

(Tr. p. 526, line 22 - p. 527, line 24). Lastly, Respondent's attorney argued to the jury that it was impossible for anyone to tell who actually committed the murder. (Tr. p. 529, lines 1-2). During the six-page closing argument from Solicitor Anders, the prosecutor urged sexual assault as Appellant's motive and that Appellant's confession was voluntary and valid. The prosecutor also asserted that Respondent's defenses of alibi, involuntary confession and absence of motive lacked credibility, including the following comment:

> It took him 28 minutes and 37 seconds. That's all it took

> him, 28 minutes and 37 seconds. He's got no remorse, no tears. He has got nothing, nothing. He wants you to be duped. He wants you to go back and say, "we've got Nazis on our Sheriff's Department that are going out and beating and forcing confessions out of people." Now, really, really. (Tr. p. 535, lines 19-25).

(Tr. p. 531, line 3 - p. 536, line 24).

The jury found Respondent guilty of murder and he was sentenced to confinement for life.

A timely Notice of Intent to Appeal was filed and an appeal was perfected by Lester Bates, Esquire. After filing briefs in this case, oral argument was heard by the South Carolina Supreme Court on June 11, 1987. On June 22, 1987, the South Carolina Supreme Court affirmed Respondent's conviction and sentence in a Memorandum Opinion. The issue concerning the Solicitor's closing argument comment was not raised on direct appeal.

B. **Collateral Proceedings**

In the Application for Post-Conviction Relief Respondent filed in the South Carolina Court of Common Pleas, he claimed, among other grounds, that he received ineffective assistance of counsel because trial counsel failed to object to the prosecutor's reference to his lack of remorse alleging that it constituted a comment upon his right to plead not guilty and put the State to its burden of proof. He asserted that it would be inconsistent for him to plead not guilty, present the defense of alibi, and then simultaneously express remorse for the act which he had denied committing.

The post-conviction relief hearing court determined that the Solicitor's references were inappropriate and improper but found that Respondent had failed to meet his burden of demonstrating that the comment so infected the trial with unfair-

ness as to make the resulting conviction a denial of due process. (See Appendix A at p. A-18).

On Appeal to the South Carolina Supreme Court from denial of Post-Conviction Relief, Respondent asserted that the prosecutor's comment constituted an impermissible reference to Respondent's right to remain silent and violated his right against self-incrimination and right to present a defense. Respondent challenged in his brief the strength of the State's case based upon disparity in portions of the Respondent's confession with the actual position of the victim's body; the fact that none of the victim's hairs or fibers were found in Respondent's vehicle; and because the murder weapon was heavy and no blood or hair was found on it. The South Carolina Supreme Court reversed the ruling of the Court of Common Pleas, finding error in the lower court's failure

to grant Post-Conviction Relief. The South Carolina Supreme Court concluded that trial counsel provided ineffective assistance when he failed to object to the Solicitor's closing argument reference to Respondent's failure to show remorse. The Circuit Court order denying Post-Conviction Relief was reversed. (See Memorandum Opinion No. 21488 submitted herein as Appendix B. p. A-47-49).

REASON WHY THE WRIT SHOULD BE GRANTED

The prosecutor's comment was not an impermissible reference to Respondent's right to remain silent, did not violate Respondent's rights against self-incrimination and right to present a defense, and did not infect the trial with unfairness so as to make the resulting conviction a denial of due process and, therefore, the failure of Respondent's attorney to object to the comment did not violate Respon-

dent's Sixth Amendment right to effective assistance of counsel.

I. **DID THE STATE COURT HEARING JUDGE ERR IN FINDING THAT THE SOLICITOR'S CLOSING ARGUMENT REFERENCE TO RESPONDENT'S LACK OF REMORSE CONSTITUTED A FIFTH AMENDMENT VIOLATION OF RESPONDENT'S PRIVILEGE AGAINST SELF-INCRIMINATION WHERE THE PRIVILEGE WAS WAIVED WAIVED WHEN RESPONDENT VOLUNTARILY CONFESSED TO THE MURDER AND WHEN RESPONDENT TESTIFIED IN HIS OWN BEHALF AT TRIAL?.**

Petitioner asserts that the South Carolina Supreme Court opinion below, that Petitioner was denied his Sixth Amendment right to effective assistance of counsel, was incorrect. As Petitioner urged to the hearing court and the South Carolina Supreme court below, the prosecutor's closing argument reference to Respondent's lack of remorse did not constitute an impermissible reference to Respondent's Fifth Amendment right to remain silent. Respondent waived the right by voluntarily and knowingly confessing to the murder and

by testifying at trial. The Solicitor's comment was not a reference to Respondent's failure to testify or to his post-arrest silence because neither are applicable to the facts of this case. The comment by the prosecution constituted a remark upon the credibility of Respondent's trial testimony and upon Respondent's demeanor while testifying and as an explanation for Respondent's cold, deliberate actions following the murder. The comment may not be considered a violation of Respondent's Fifth Amendment privilege against self-incrimination also because it constituted responsive summation invited by Respondent's closing argument to the jury. Because the prosecutor's comment was permissible, trial counsel's failure to object was neither deficient nor prejudicial. Respondent was not denied the Sixth Amendment Right to effective assistance of counsel. The finding otherwise

by the South Carolina Supreme Court was incorrect.

A criminal defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759 (1970). This Court in Strickland v. Washington, 466 U.S. 668 (1984), set forth a two part test to determine whether reversal of a conviction is warranted in a criminal case based upon ineffective assistance of counsel. A defendant must first show deficiency in trial counsel's performance. In making this determination:

> ...a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound strategy.'

Strickland v. Washington, 466 U.S. at 689-690. A criminal defendant must also satisfy the second prong of this Court's test which requires a showing that he was

prejudiced by counsel's performance. In Strickland, this Court determined that:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. 466 U.S. at 694.

Because there was no Fifth Amendment violation involved in this case, trial counsel's failure to object on that basis did not result in a Sixth Amendment violation of Respondent's right to effective assistance of counsel.

The Fifth Amendment to the United States Constitution provides that an individual may not be compelled to be a witness against himself. Raffel v. U.S., 271 S.C. 494 (1926); Griffin v. California, 380 U.S. 609 (1965); Jenkins v. Anderson, 447 U.S. 231 (1980). When a criminal defendant chooses not to testify

at trial, the Fifth Amendment prohibits the prosecutor from making reference to the accused's refusal to testify. Griffin v. California, 380 U.S. 609 (1965). The Fifth Amendment protects a criminal defendant from unfavorable inferences from the defendant's silence. Raffel v. U.S., supra. If a criminal defendant elects not to testify in his own behalf, the prosecutor may not comment or argue about the accused's failure to testify. Stewart v. U.S., 366 U.S. 1 (1961). However, the immunity provided by the Fifth Amendment is waived by an accused if the accused becomes a witness and testifies at trial in his own behalf. "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do." Raffel v. U.S., 271 U.S. at 499. When an accused waives the privilege and offers himself as a witness, he

assumes the position of any other witness for purposes of cross-examination and credibility. Raffel v. U.S., supra; U.S. v. Whitehead, 618 F.2d 523 (4th Cir. 1982). Use thereafter by prosecutor of cross-examination and argument to impeach the accused's credibility is permissible. Jenkins v. Anderson, 447 U.S. 231 (1980).

> Once a defendant decides to testify, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.

Jenkins v. Anderson, 447 U.S. at 238.

Respondent's Fifth Amendment right was clearly not violated in this case, contrary to the South Carolina Supreme Court finding, because Respondent did not remain silent. He voluntarily confessed to the crime, after waiving his rights, and voluntarily testified at trial in his

own defense. Because of the confession and trial testimony, it was appropriate for the State to comment upon Respondent's mental status concerning the existence or non-existence of malice which was an element of the crime; to comment upon the credibility of Respondent's trial testimony which conflicted with Respondent's earlier confession; and to comment upon the credibility of Respondent's defense that, in addition to an imperfect alibi, Respondent could not have committed the offense because he acted normally shortly after the crime was to have been committed. Respondent placed his credibility, demeanor and conduct into evidence and rendered it ripe for comment. Impeachment by cross-examination and argument was permissible after Respondent's "own decision to cast aside his cloak of silence." Jenkins v. Anderson, 447 U.S. at 238. The state Supreme Court incorrectly concluded

that Respondent's Fifth Amendment right against self-incrimination was violated by the Solicitor's closing argument reference to Respondent's lack of remorse. Under the evidence it cannot be construed as an improper comment on Respondent's refusal to testify.

Also, Petitioner asserts that the Solicitor's comment upon Petitioner's lack of remorse was not a reference to Petitioner's Constitutional right against self-incrimination but, rather, was responsive to the evidence elicited during trial and to Respondent's summation to the jury. Specifically, Respondent presented a defense of incomplete alibi. Respondent also urged to the jury through defense witness testimony and closing argument that his lack of emotion and normal conduct of shopping and playing basketball shortly after the murder supported his claim of innocence. The prosecutor in

this case merely challenged the veracity of Respondent's defense by conveying to the jury in his argument that Respondent's lack of emotion was not indicative of innocence, but revealed that Respondent cold-bloodedly murdered the young victim with no thought thereafter of the consequences of his actions. The Solicitor referenced Respondent's lack of remorse as an alternative explanation to the jury for Respondent's unemotional state as a challenge to the credibility of Respondent's evidence and theory of defense. This comment concerning Respondent's lack of remorse was properly based upon the evidence elicited from defense witnesses concerning Respondent's demeanor and actions the day the victim was murdered; was based upon evidence elicited from officers that Respondent was not upset when he reported to them the deeds he committed or revealed to them the murder

weapon; was based upon Respondent's credibility and demeanor during his trial testimony; and was based upon defense counsel's argument to the jury concerning Respondent's post-murder demeanor. The prosecutor's argument did not improperly implicate the exercise by Respondent of his Constitutional Rights. It was an appropriate and responsive comment to Respondent's defense and the summation Respondent presented to the jury that he was innocent because he acted normal after the crime. It was proper rebuttal argument and did not violate Respondent's Fifth Amendment privilege. United States v. Robinson, 485 U.S. 25 (1988). The "protective shield of the Fifth Amendment should not be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on weaknesses in the defense case." Id, 485 U.S. at 32, citing U.S. v. Hastings, 461 U.S. 499

(1983). The prosecutor fairly responded to the argument of Respondent.

II. **DID THE SOUTH CAROLINA SUPREME COURT ERR IN FINDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO THE SOLICITOR'S CLOSING ARGUMENT REFERENCE TO RESPONDENT'S LACK OF REMORSE CONSTITUTED A VIOLATION OF RESPONDENT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE REFERENCE DID NOT INFECT THE TRIAL WITH UNFAIRNESS SO AS TO MAKE THE RESULTING CONVICTION A DENIAL OF DUE PROCESS AND WARRANTING REVERSAL OF THE CONVICTION?**

On appeal to the South Carolina Supreme Court from denial of post-conviction relief, Respondent asserted that the prosecutor's comment constituted an impermissible reference to Respondent's right to remain silent and violated his right against self-incrimination and right to present a defense. Respondent challenged in his brief the strength of the State's case based upon disparity in portions of the Respondent's confession with the

actual position of the victim's body; the fact that none of the victim's hairs or fibers were found in Respondent's vehicle; and because the murder weapon was heavy and no blood or hair was found on it. The South Carolina Supreme Court reversed the ruling of the Court of Common Pleas, finding error in the lower court's failure to grant Post-Conviction Relief. The South Carolina Supreme Court concluded that trial counsel provided ineffective assistance when counsel failed to object to the Solicitor's closing argument reference to Respondent's failure to show remorse.

In reviewing summation by the prosecution for reversible error, it must be determined whether the prosecutor's comments taken in context of the entire record, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v.

Wainwright, 477 U.S. 168 (1986) and Donnelly v. DeCristoforo, 466 U.S. 637 (1984). Petitioner asserts that the state Supreme Court incorrectly found that "the Post-Conviction Relief judge erred in failing to grant Post-Conviction Relief when counsel did not object to solicitor's closing argument that...(Respondent) showed no remorse." Fossick v. State, supra. The prosecutor's closing argument reference to Respondent's lack of remorse did not so infect the trial with unfairness as to make the conviction a denial of due process. The conviction was correct on the merits, Respondent received a fair trial, and no other verdict could reasonably have been reached, rendering any error in the reference harmless. See U.S. v. Hastings, 461 U.S. 499 (1983) (Based upon overwhelming evidence of the accused's guilt in the record as a whole, any error in the prosecutor's comment on the

failure of the accused to testify was harmless).

There is strong evidence in the record of Respondent's guilt. Respondent, by his own admission and by the testimony of a State's witness was the last person to be seen with the victim in the vicinity where the victim's body was later found. Respondent confessed to the sexual assault and murder of the victim. The manner of death, condition of the body, instrumentality, and location of the instrumentality causing death all as confessed to by Respondent were consistent with what investigating officers found. Further, Respondent was not able to account for his whereabouts during the crucial period of time during which the murder was alleged to have occurred. Respondent also displayed a bite mark consistent to that he reported he received from the victim during the assault and murder. Respondent

gave officers conflicting versions until he was confronted. He also asked an acquaintance to go to court for him before the body had been found.

In the context of the entire trial and the overwhelming evidence of Respondent's guilt, the brief sentence uttered by the prosecutor in closing was, at most, ambiguous and did not render the trial so fundamentally unfair as to deny due process. Donnelly v. DeCristoforo, supra. The prosecutor's reference in this case must also be reviewed in context with the summation from defense counsel. Darden v. Wainwright, supra. As previously set forth in Argument I, the reference was invited by and was responsive to Respondent's closing argument to the jury. Whether comments are responsive is a factor to consider in determining the effect of the reference on the trial. Id. The overwhelming nature of the evidence,

the brevity of the comment, the responsive nature of the reference, and the ambiguity of the comment in question reduced the likelihood that the jury's verdict was influenced by the argument.

The state Supreme court incorrectly determined that Respondent showed requisite prejudice to support a finding of ineffective assistance of counsel. Considering the evidence in this case, there is not "a reasonable probability that, absent the error, the fact finder would have had a reasonable doubt respecting guilty." Strickland v. Washington, 466 U.S. at 695.

CONCLUSION

The Petitioner for Writ of Certiorari should be granted.

Respectfully submitted,

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